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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 57 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

JENAJI MANAJI THAKORE
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 57 of 1997
MR JS YADAV for Appellant No.
MR RC KODEKAR, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 03/02/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE AKSHAY H.MEHTA)

1. The appellant has preferred this appeal to challenge judgment and order of conviction and sentence passed against him by the Ld. Addl. Sessions Judge, Mehsana in Sessions Case No. 161 of 1996 dated 3/1/1997. By the said judgment the appellant has been convicted for offence under section 302 of the Indian Penal Code [for short 'IPC'] and he has been sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/=, in default to undergo RI for six months. He has also been convicted for offence under section 307 of the IPC and sentenced to suffer RI for five years and to pay fine of Rs.500/=, in default to undergo further RI for three months. The appellant was tried alongwith three original accused who have been acquitted by the learned trial Judge. It appears that no acquittal appeal is filed to challenge their acquittal.

2. Case of the prosecution, in nutshell, can be stated as under :-

2.1. The incident in question took place at about 8.00 p.m. on 6/7/1995 at village Vadosan in Mehsana district. The first informant PW 4 - Rupsangji Dhanaji Thakor owned a well in his field where he was also residing with his family. He used to provide water to the neighbouring farmers on hourly basis. The deceased, who happened to be his father, owned a grocery shop in the village Vadosan. He used to go to the shop at 7.00 a.m. and would return in the afternoon and thereafter, after having his lunch he would go back and return late in the evening. It is the case of the prosecution that on the day of incident the appellant went to the bore of the informant and asked him whether he would like to give water to him. It appears that previously the informant had given water to him but no payment was made for the same by the appellant and on the day of incident also he demanded water in a threatening manner. The informant responded to his question by saying that first the appellant should clear his arrears and then demand water. The appellant, therefore, got excited and he started giving abuses to the informant in a loud voice. On hearing some commotion, Malaji Manaji, Badaji Manaji and Ramaji Chaturji came there. They persuaded the appellant to leave. He thereafter went towards his field. Within short time the informant heard a scream of his father. He immediately rushed to the place with Malaji and his wife. When he went there, he saw the appellant. He had caught the deceased. He

inflicted a blow with knife on his stomach. It is the case of the prosecution that the original accused also assaulted the deceased with stick. As a result of the injury that was caused on the stomach with knife, the intestine of the deceased had come out from the wound. He was made to lie on a cot and taken to the house of the informant. In the meanwhile the appellant again chased the informant with the knife, hence the informant got scared and started running towards his machine room. He was followed by the appellant and other original accused. When he reached near the machine room, he was caught by the appellant. The appellant inflicted a blow with knife on his stomach. The appellant and others thereafter ran away from the place when they saw wife and daughter of the informant coming to that side. It is the say of the informant that he was also beaten by other original accused with sticks. The informant and his father were taken to Mehsana and admitted in Civil Hospital. Upon their admission the police was informed it being a medicolegal case. Before the police the complaint was given by the informant which is on record at Exh. 32. The statement of the deceased was also recorded. Both of them thereafter were sent to Ahmedabad Civil Hospital for further treatment. At Ahmedabad, operation was performed on the deceased but he died three days thereafter. The police in the meanwhile commenced the usual investigation and at the end of the same, submitted the charge-sheet in the Court of Ld. Magistrate against the appellant and three other original accused for committing offences under sections 302, 307, 323 and 504 of the IPC and section 135 of the Bombay Police Act. The Ld. Magistrate committed the case to the Court of Sessions as offence under section 302 is exclusively triable by the Court of Sessions.

2.2. At the trial, the Ld. Addl. Sessions Judge, Mehsana framed charge at Exh. 13 against all the accused on 7th September, 1996. The appellant and other accused pleaded not guilty to the charge and claimed to be tried.

2.3. The prosecution, to substantiate its case, examined 13 witnesses and also produced documentary evidence. After the recording of evidence was over, further statements of the appellant as well as original accused were recorded. Their defence appears to be that of general denial.

2.4. As stated above, the appellant was convicted by the trial Court and awarded sentence of imprisonment; whereas three other original accused were

acquitted of all the charges levelled against them. It is this order of conviction and sentence which are being challenged by the appellant in this appeal.

3. We have heard Mr. J S Yadav, learned advocate for the appellant and Mr. R C Kodekar, Ld. APP for the respondent - State. Mr. Yadav has submitted that the finding given by the learned trial Judge that the appellant is guilty of committing offence made punishable under section 302 of the IPC is erroneous. He has further submitted that considering the evidence and in particular the medical evidence, it is very clear that the deceased has died of infection and there is no direct nexus between the injury and the death. In other words the deceased has died of peritonitis and, therefore, the appellant cannot be held guilty of offence under section 302 of the IPC. Lastly he has submitted that the appeal be allowed and the appellant be acquitted.

3.1. As against that, Mr. R C Kodekar, Ld. APP has supported the judgment and has submitted that considering the fact that the appellant had used knife and caused injury on the stomach to both, the deceased as well as to informant, it clearly appears that the injury was inflicted by the appellant with an intention to cause death and, therefore, his act stands covered under the provisions of section 300 of the IPC. He has submitted that there is no merit in this appeal and it deserves to be dismissed.

4. With a view to reappreciate the entire evidence on record, we have carefully gone through it. We have also perused the judgment of the trial Court and we have carefully considered the submissions advanced by Mr. Yadav as well as by Mr. Kodekar. It is clear from the record that the deceased died due to injury received by him; whereas the informant though received injury on stomach with knife, survived. It also appears that the entire incident arose on account of the informant Rupsang not agreeing to supply water to the appellant since he had not paid the purchase price for the water to the informant. On this aspect there is evidence of the informant P W 4 - Rupsangji D Thakor Exh. 31. According to this witness, he was staying in the field alongwith his other family members. He had a bore facility in his field. He also supplied water to the neighbouring field owners by charging money on hourly basis. The deceased, who happened to be his father, had grocery shop in the village and he used to go there at about 7.00 a.m. and in the afternoon he would return for having lunch and thereafter would again go back to the shop and return in

the evening around 8.00 p.m. He has also stated that on the day of incident, the appellant came to the informant and asked him whether he would give water to him. In response to the same, the informant told him that he should first clear the arrears and thereafter demand water. Upon receiving such reply the appellant got enraged and started uttering filthy abuses. On hearing his shouts, the neighbours came there running and persuaded the appellant to leave the place. As a result thereof, the appellant went away, but shortly thereafter cry was heard by the informant. It was of his father. He, his wife and Malaji ran in that direction. When they reached there they saw that the appellant had caught hold of the deceased. He thereafter inflicted a knife blow on his stomach. As a result thereof, intestine of the deceased came out from the wound. He was taken home. In the meanwhile the appellant and other accused chased the informant and when he reached near the machine room, he was caught by the appellant and an injury was caused on his stomach with knife. Both of them were thereafter removed to the hospital at Mehsana and subsequently to Civil Hospital at Ahmedabad. In the cross-examination by the defence, the witness has stuck to the version of the incident stated in the FIR. Ofcourse certain contradictions or omissions have been brought out by the defence but they are not of much significance. By and large the witness has withstood the cross-examination.

4.1. The second witness who has seen the incident is P W 5 - Somiben Rupsangji, whose evidence is at Exh. 33. She has also deposed on the same line and has completely supported the version given by the informant Rupsang. The defence has not been able to bring out any material which may be helpful to it. In view of this evidence, there is no doubt in our mind that the author of the injuries caused to the deceased as well as to the informant was the present appellant. Thus, his involvement in the incident is very clear.

5. The next question that is required to be decided is whether the appellant could be held guilty for committing offence under section 302 of the IPC. For this purpose we may turn our attention to the medical evidence which is on record in the form of oral evidence of the Medical Officer as well as medical certificate and the post mortem examination notes. The first witness is Dr. Nimesh R Shah, whose evidence is recorded at Exh. 20. At the relevant time he was attached to Mehsana Civil Hospital as Medical Officer. He has stated that on 6/7/1995 at about 9.10 p.m. informant was brought to the hospital for treatment. He had examined the informant

and had found the following injuries :-

2.1/2 c.m. x 2 c.m. x interior deep stab wound with both acute angle and spindle shaped on Rt. lower abdomen just 1 c.m. above Rt. Ant. Sup. iliac spine, with intestine coming out of wound.

His father was also examined and on 6/7/1995 certificate reflecting the injuries was issued. Ofcourse it appears that subsequently under the advice of this witness they were shifted to Civil Hospital at Ahmedabad.

5.1. At Ahmedabad they were brought to the Civil Hospital and they were examined by Dr. Rameshchandra Bhagubhai on 7th July, 1995. He had examined the informant and also the deceased. He has recorded in his evidence the injuries suffered by them. It also appears from his evidence that at Ahmedabad the operation of the deceased was carried out, but ultimately he died.

5.2. The third medical witness is P W 2 - Dr. Vinayakrao V Patil, who conducted the post mortem examination of the deceased. His evidence is quite important to determine the nature of offence having been committed by the appellant. His evidence is recorded at Exh. 28. In the examination-in-chief he has narrated the injuries which were found on the body of the deceased. Ofcourse he is not very specific but it clearly appears that the injuries described by him include the surgical wounds also. According to his opinion, the death of the deceased was caused due to infection. He has also produced the post mortem notes. In the examination-in-chief he has stated that on account of the injuries suffered by the deceased he could have either survived or would have expired in the ordinary course of nature. The post mortem notes reflect that the cause of death is shock due to peritoritis.

6. Thus, according to Mr. Yadav when the death is caused after three days of the receipt of the injury and that too on account of peritoritis, there cannot be any intention of the part of the appellant to cause death of the deceased or cause such injury which may be sufficient in ordinary course of nature to cause death. We have perused the evidence of Dr. Rameshchandra and he has very categorically stated that the injury received by the patient may result into his death or may not. Thus, in other words, in his opinion, the injury was likely to cause death. In view thereof, it is very clear that the injury was not sufficient in

ordinary course of nature to cause death. The offence under section 302 of the IPC is, therefore, out of question. Mr. Kodekar's submission that looking to the fact that knife was used and injuries were caused on the stomach of both, the deceased as well as informant, there was intention on the part of appellant to cause death. However, when the expert's evidence i.e. Medical Officer states that the death was not a certainty as a result of the assault by the appellant on stomach with knife and he could have survived. Thus, considering the fact that the injury was likely to cause death, it can safely be concluded that the appellant intended to cause injury which was likely to cause death. This is not an offence punishable under section 302 of the IPC. In our opinion, the trial Court has, therefore, arrived at erroneous conclusion holding the appellant guilty of committing offence under section 302 of the IPC.

6.1. If it is not a culpable homicide amounting to murder, then what offence it could be. We have dealt with the medical evidence above. So far the oral evidence of the eye witnesses is concerned, it not only shows the involvement of the appellant in the incident but from their evidence it also becomes very clear that he intended to inflict such bodily injury which was likely to cause death. In that view of the matter, Mr. Yadav's submission that at best the offence could be under section 326 or 304 Part-II of the IPC cannot be accepted. When the intention is clear and it is to cause such bodily injury, which is likely to cause death, the offence would stand covered under section 304 Part-I of the IPC. We, therefore, alter the conviction of the appellant from section 302 of the IPC to one under section 304 Part-I of the IPC.

6.2. So far the attack on the informant is concerned, we have accepted the evidence of the informant himself as well as that of his wife Somiben. Their evidence also clearly shows that the appellant had intended to inflict injury on the body of the informant with knife and for inflicting the injury vital part of the body such as stomach was selected. It is, therefore, easy to infer that the appellant did the act with such intention or knowledge and under such circumstances that if he, by that act caused death, he would be guilty of murder. It was sheer grace of God that the victim survived. In that view of the matter, we are in complete agreement with the finding of the trial Court to the effect that the appellant is guilty of committing offence which is made punishable under section 307 of the IPC for attempting to commit murder of the informant. His

conviction and order of sentence on that count are retained.

6.3. Since we have altered conviction of the appellant from section 302 of the IPC to one under section 304 Part-I of the IPC, we also reduce the sentence from imprisonment for life to the sentence already undergone by the appellant. It is stated before us that the incident took place on 6/7/1995 and since July 1995 the appellant is in the prison, initially as pretrial prisoner and thereafter as a convict prisoner. It, therefore, appears that by now he has completed 9 years and 6 months sentence of imprisonment. Hence, we impose the sentence already undergone for committing offence under section 304 Part-I of the IPC. We, however, retain the sentence of fine. If the fine is not paid, the appellant may pay the same forthwith. Otherwise he will have to undergo default sentence prescribed by the trial Court. As stated above, the sentence for offence under section 307 of the IPC is retained. It is also directed that both the sentences are ordered to run concurrently. In that view of the matter, it is directed that the appellant should be set at liberty forthwith.

In the result, the appeal is partly allowed.

Muddamal articles to be disposed of in accordance with the direction given by the trial Court.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.